

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC.	DOCKET NO. INU-99-3
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ORDER DENYING REQUEST FOR RULE MAKING PROCEEDING

(Issued October 11, 1999)

On May 25, 1999, U S WEST Communications, Inc. (U S West), filed a petition asking the Utilities Board (Board) to determine that certain portions of U S West's existing local exchange service area have become subject to effective competition and should be deregulated. U S West calls these areas "competitive zones." On July 23, 1999, the Board docketed the petition as Docket No. INU-99-3 and set a procedural schedule.

Pursuant to that order, the Board invited interested persons to file sworn statements of position and counterstatements. On September 10, 1999, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a statement of position in this docket. As a part of its statement, Consumer Advocate requested initiation of rule making proceedings, asking the Board to delay action on U S West's petition for deregulation of competitive zones while the Board considers and, if necessary, adopts rules setting out the Board's policy regarding deregulation on a less-than-statewide basis.

Consumer Advocate's argument may be summarized as follows: First, new IOWA CODE § 17A.3(1)"c" (1999) provides that each agency should adopt rules embodying the standards, principles, and procedural safeguards it will apply to the law it administers, but only so long as, and to the extent that, under the circumstances the agency can reasonably do so. Consumer Advocate interprets this as a state policy statement in favor of developing agency law by rule making.

Consumer Advocate states its understanding that the Board is engaged in a general inquiry in this proceeding, based upon an "order [that] departs from past Board policy, which disfavored deregulation of telecommunications services on a less-than-statewide basis." The order initiating this docket further states that it is the Board's intention to develop a "complete evidentiary record concerning application of the criteria of [existing] subrule 5.6(1)." Consumer Advocate sees a tension between the general inquiry (whether it is appropriate to deregulate on a geographic basis) and the specific inquiry (whether to grant U S West's petition to deregulate the alleged "competitive zones"). Consumer Advocate submits that there is no reason not to defer action on U S West's petition so the Board can conduct a rule making proceeding to develop general policy before deciding whether to grant the petition.

U S West filed a response to Consumer Advocate's motion, arguing that there are no new policies to be considered in this docket and therefore no need for a rule making proceeding. U S West argues that state law already establishes the

only relevant policy: Telecommunications services that are subject to effective competition should be deregulated. In U S West's view, this leaves only the fact question of determining whether the alleged competitive services are subject to effective competition, a question the Board should consider and determine in the pending docket.

ANALYSIS

Consumer Advocate raises an important point regarding new § 17A.3(1)"c", which appears to change Iowa law regarding agency policy development. Prior to the amendment of the statute, each agency had the choice of developing policy through contested cases or by general rule making. Teleconnect v. Iowa State Commerce Comm'n, 366 N.W.2d 515, 519 (Iowa 1985). Under Consumer Advocate's interpretation of the new statute, an agency can no longer consider those options on an equal basis; instead, the statute creates a preference in favor of lawmaking by rule, where feasible and practicable.

This does not mean that the Board must totally abandon contested case proceedings in favor of rule makings, however. This docket offers a good example of the type of issue where lawmaking by rule may not be feasible or practicable, because it is possible that the only principle that may come from this case is that deregulation of local telecommunications services is so fact-sensitive that it does not lend itself to adoption of fixed principles.

This is demonstrated by the fact that no existing Board rule has to be changed or waived to permit consideration of U S West's petition. It is true that two past Board decisions (developed in contested cases under the Teleconnect principle of agency choice) stated that the Board would not approve geographically-limited deregulation in those dockets, but those decisions were based upon the facts before the Board in those cases and did not necessarily establish regulatory "principles" that should guide the Board's decision in this case. One reason the Board decided not to deregulate on a geographic basis in the past was the accounting and ratemaking implications of doing so. That concern has largely disappeared with the use of price regulation. Thus, one of the facts underlying the prior decisions is not present in this case, and the alleged "principle" disfavoring geographic deregulation may not apply in this case.

Moreover, Consumer Advocate's motion appears to assume that the Board has already decided to permit geographic deregulation and that the Board should, therefore, adopt a policy stating that position. The Board has not made any such decision, however. The prior order in this docket finds that the Board has the authority to deregulate on a less-than-statewide basis, but it does not find that the Board should or will exercise that authority in this case or any other. For this reason, it may be premature to adopt new rules establishing a policy in favor of geographic deregulation before the Board has examined the costs and benefits of that option in the context of a specific case.

Clearly, the Board could try to proceed in the manner suggested by Consumer Advocate, but the new statute does not require that the Board proceed by rule making whenever it is possible. Instead, the requirement applies only when that option is "feasible" and "practicable." The Board believes it is not practical to proceed with rule making in this particular instance because of the fact-sensitive nature of the inquiry.

At the same time, Consumer Advocate raises a good point regarding the desirability of obtaining general public comment in this docket. The procedures the Board is using in this docket were carefully designed to provide for the broadest possible public input in a fact-finding proceeding, by combining rules-type public notice with contested case hearing procedures. These procedures are in full compliance with existing Board rules for deregulation investigations.

Moreover, the Board's deregulation procedures are designed to produce timely action on U S West's petition while assembling a satisfactory record for the Board to consider. Consumer Advocate's proposal to use a two-step process would delay action on the U S West petition while conducting a separate rule making proceeding that is unlikely to produce a record that differs in any significant respect from the single record the Board will assemble in this docket.

Thus, the Board finds that deferring action on U S West's petition to conduct a rule making proceeding is not feasible or practicable because it would unduly delay the agency ruling on U S West's petition and because it may be premature to

conclude that the Board is already in a position to consider and adopt final principles regarding deregulation on a geographic basis. If the Board finds that it is necessary to consider the adoption of a new regulatory principle relating to any of the issues in this docket, the Board will consider initiating a rule making proceeding at that time.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The request for initiation of rule making proceedings filed by the Consumer Advocate Division of the Department of Justice on September 10, 1999, is denied.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Raymond K. Vawter, Jr. /s/ Diane Munns
Executive Secretary

Dated at Des Moines, Iowa, this 11th day of October, 1999.